A

HANIF MOHAMAD ALI v. PP

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
IDRUS HARUN JCA
AB KARIM AB JALIL JCA
B [CRIMINAL APPEAL NO: R-05-82-03-2015]
10 JUNE 2016

C ***CRIMINAL LAW:*** *Murder – Appeal – Conviction under s. 302 of Penal Code – Whether injury intentional – Whether accused knew that act was sufficient in ordinary course of nature to cause death – Whether element of knowledge necessary to prove offence under s. 300(c) of Penal Code – Whether death within contemplation of s. 300(c) – Whether defence was bare denial and afterthought*

D ***CRIMINAL PROCEDURE:*** *Appeal – Appeal against conviction and sentence – Conviction under s. 302 of Penal Code – Whether injury intentional – Whether injury was sufficient in ordinary course of nature to cause death – Whether element of knowledge necessary to prove offence under s. 300(c) of Penal Code – Whether death within contemplation of s. 300(c) – Whether defence was bare denial and afterthought*

E ***CRIMINAL PROCEDURE:*** *Charge – Error in charge – Whether error could affect proof of prosecution's case – Whether charge disclosed offence – Whether fatal – Whether error curable – Whether accused misled - Whether occasion in failure of justice – Criminal Procedure Code, ss. 156 & 422*

F The appellant was charged under s. 302 of the Penal Code for the murder of the deceased, a standard one pupil. The appellant was a warden at the school hostel where the deceased was staying. On 31 March 2011, PW6, another warden at the hostel, saw the appellant sitting on the floor in his room with the deceased lying on in his lap. The deceased had a seizure and lockjaw. The deceased was immediately taken to the hospital. The deceased
G was pronounced dead at 8.40am on 3 April 2011. The post-mortem report by PW24 stated that there were marks of injury by blunt force trauma on the body of the deceased, which was not fatal in nature. There were also injuries to the neck of the deceased which was consistent with that of a compression of the neck by manual strangulation. The cause of the death was determined
H as 'hypoxic sequelae to compression of the neck'. PW24 testified that the death could be considered as delayed death. The appellant, in his defence, stated that on 31 March 2011, he had taken the deceased to his room to advice the deceased against stealing. He admitted to have slapped the deceased and hit his head and tied the hands of the deceased to the iron grille of the window. The appellant also stated that he lifted and shook the deceased
I three or four times but denied strangling his neck. The trial judge found, *inter alia*, that (i) the appellant's defence was mere denial; (ii) the evidence led by

the prosecution showed that the appellant committed the act of compression to the deceased's neck manually; (iii) the evidence of P24 proved that the compression on the neck would ordinarily cause death, though not immediately; and (iv) the appellant, while committing the act, knew that his act was sufficient in the ordinary course of nature to cause death. The appellant was therefore found guilty of the offence of murder and was sentenced to death. Hence, this appeal by the appellant against the conviction and sentence. The issues that arose for the court's determination were: (i) whether the injury inflicted by the appellant was probably not intended or otherwise intentional; and (ii) where the injury inflicted was intentional, whether such injury was sufficient in the ordinary course of nature to cause the deceased's death so that the appellant's act could be brought under s. 300(c) of the Penal Code.

Held (allowing appeal; convicting appellant under s. 304(a) of Penal Code)
Per Idrus Harun JCA delivering the judgment of the court:

(1) Limb (c) of s. 300 does not require the prosecution to prove that the appellant knew that his act was sufficient in the ordinary course of nature to cause death. The judge therefore had misapprehended the law when he found that the appellant knew that his act was sufficient in the ordinary course of nature to cause death. The judge's finding was not supported by any evidence from which it could be inferred that the appellant had such knowledge. The element of knowledge is only necessary where the prosecution seeks to prove the offence of murder under limb (b) of s. 300. The prosecution, in this case, was not relying on limb (b) of s. 300. (para 20)

(2) The charge contained an allegation that the offence was committed between 6pm to 12 midnight on 31 April 2011, whereas the prosecution led evidence to show that the offence was allegedly committed by the appellant one month earlier which was on 31 March 2011. There was no dispute that the deceased succumbed to the injury on 3 April 2011. Although the prosecution did not amend the charge, the trial judge had correctly decided that the defect was not fatal as it was curable under s. 422 of the Criminal Procedure Code ('CPC') and amended the charge by substituting 31 March 2011 for 31 April 2011 as the date of the commission of the offence. The trial judge could also rely on s. 156 of the CPC as such error was not material unless the appellant was misled by the error. (paras 22 & 23)

(3) The charge alleged that the appellant committed the murder between 6pm to 12 midnight on 31 March 2011. As the deceased had not died yet during the period in question, the offence of murder with which the appellant was charged had yet to be committed. The charge should have stated that the alleged murder was committed between 6pm on 31 March

A 2011 to 8.40am on 3 April 2011 when the deceased was pronounced dead *ie*, the date and time the crime of murder was perfected. However, the irregularity did not occasion in a failure of justice and was curable under s. 422 of the CPC and was also immaterial under s. 156 of the CPC as it did not mislead the appellant. (para 25)

B **(4)** The case against the appellant was based entirely on circumstantial evidence. There was no direct evidence to show what had happened while the deceased was with the appellant in the appellant's room. Where the prosecution sought to prove murder under limb (c) of s. 300, the prosecution ought to provide proof that the bodily injury intended C to be inflicted on the deceased was sufficient in the ordinary course of nature to cause his death. That proof should appropriately be adduced by way of medical evidence of the pathologist who conducted the post-mortem examination. Without this evidence, there would be a fatal gap in the prosecution's case in that the second essential element of the D offence in limb (c) was not established. There was a glaring absence of such proof from PW24's expert testimony. PW24's evidence, at best, would only bring the appellant's act to be within s. 299 of the Penal Code. (paras 29, 31 & 33)

(5) The circumstantial evidence conclusively established that the appellant E did commit the act of compression to the deceased's neck, which caused only one injury, hypoxic sequelae, that caused infarction affecting the brain, but did not cause immediate death. The death that ensued from such bodily injury was delayed death. It could therefore be safely inferred that there was no violence and prolonged or continued F compression of the neck, lest the deceased's death would have been instant. The appellant's act was more consistent with an inference that such act was not calculated to inflict the injury with the probable consequence of death. Considering the degree of force applied and the short period of time involved in committing the act, the appellant could G not have intended the injury suffered by the deceased that led to his death. (paras 37 & 38)

(6) The appellant's treatment of the deceased prior to the incident and the evidence during the incident itself would also fortify the court's finding. It was in evidence that the appellant cared for the deceased. Even though H on the night of the fatal incident the appellant had tied, slapped and hit the deceased, when the deceased had a seizure, the appellant applied medicated oil on the deceased and placed a feather duster in his mouth to prevent a lockjaw. The appellant had also called for PW6 and PW9 to his room. He further explained that he wanted the deceased to reform. I (para 39)

(7) Bare denial is one where there is a mere simple denial which is bereft of any explanation or evidence that would cast a reasonable doubt on the prosecution's case. The appellant had testified in respect of the circumstances that had led and the reasons as to what had caused the appellant to do what he had done to the deceased. Hence, the appellant's evidence did not fall within the category of bare denial or an afterthought. The trial judge, in concluding that the appellant's defence was a bare denial and an afterthought, had completely omitted to consider that the compression was inflicted for a brief period or was not long enough. Such evidence was critical in determining whether the appellant had the intention to inflict the injury in question. (paras 41 & 42)

(8) Considering the totality of the evidence, the deceased's death was the likely result from the injury. It was certainly not the death within the contemplation of s. 300(c) of the Penal Code that would be the most probable result having regard to the ordinary course of nature. This case was one which could be brought within the lesser offence of culpable homicide not amounting to murder under s. 299, punishable under s. 304(a) of the Penal Code. (paras 43 & 46)

(9) The appellant's act could not be condoned especially when the deceased was under his charge when he was a warden which had placed him in a position of trust but which trust he had so brazenly breached. He had clearly exhibited defiant disregard of the law by exceeding his authority as a warden and a teacher. Public interest demands that the court ensure public safety in particular where it concerns school going children placed under the care of school authority by meting out immediate and adequate punishment to a crime of this nature. Adequate punishment for this serious crime would also discourage future criminal conduct. The appellant was sentenced to a term of imprisonment of 20 years with effect from his date of arrest. (para 47)

Obiter:

(1) Any serious error in the charge can be a costly blunder that could affect the proof of the prosecution's case or raise the question whether it has discharged the burden of proving the offence with which the appellant was charged. It could also mean that the charge may not disclose any offence or that the appellant has not been informed with certainty and accuracy, the exact nature of the charge brought against him. Although the issue of discrepancy in the date and time of charge was not raised in the appeal, it was of some significance for the court to delve into the matter in view of the manifest unsatisfactory features in the prosecution's case that clearly demonstrated sheer carelessness in the manner in which the case was handled. This case should be a salutary

A reminder to parties before the court to be a little more diligent and display the highest standard of competence in conducting the case during a trial. (paras 24 & 25)

[Conviction and sentence of death against the appellant was set aside. Appellant convicted to an offence under s. 304(a) of the Penal Code and sentenced to 20 years B *imprisonment].*

***Bahasa Malaysia** Headnotes*

Perayu dipertuduh di bawah s. 302 Kanun Keseksaan bagi pembunuhan si mati, seorang murid darjah satu. Perayu adalah warden di asrama sekolah di C mana si mati tinggal. Pada 31 Mac 2011, PW6, seorang lagi warden di asrama tersebut, melihat perayu duduk di lantai biliknya dengan si mati di atas ribanya. Si mati diserang penyakit sawan dan kancing gigi. Si mati dikejarkan ke hospital serta merta. Si mati disahkan meninggal dunia pada pukul 8.40 pagi pada 3 April 2011. Laporan bedah siasat oleh PW24 D menyatakan bahawa terdapat kesan kecederaan akibat trauma daya tumpul pada jasad si mati, yang tidak bersifat boleh mengakibatkan kematian. Terdapat juga kecederaan pada bahagian leher si mati yang konsisten dengan tekanan pada leher dengan mencekik dengan tangan. Sebab kematian diputuskan sebagai 'hypoxic sequelae to compression of the neck'. PW24 E memberi keterangan bahawa kematian tersebut boleh dianggap sebagai kematian tertunda. Perayu, dalam pembelaannya, menyatakan bahawa pada 31 Mac 2011, dia membawa si mati ke biliknya untuk menasihati si mati agar tidak mencuri. Dia mengaku ada menampar si mati dan memukul kepala dan mengikat tangan si mati pada gril besi tingkap. Perayu juga menyatakan bahawa dia mengangkat dan menggoncang si mati tiga atau F empat kali tetapi menafikan bahawa dia mencekik leher si mati. Hakim bicara mendapati, antara lain, bahawa (i) pembelaan perayu adalah penafian semata-mata; (ii) keterangan yang dikemukakan oleh pihak pendakwaan menunjukkan bahawa perayu melakukan tindakan mencekik leher si mati dengan tangan; (iii) keterangan P24 membuktikan bahawa mencekik leher G pada kebiasaannya akan mengakibatkan kematian, walaupun bukan dengan segera; dan (iv) perayu, semasa melakukan tindakan tersebut, mengetahui bahawa tindakannya mencukupi dalam penjalanan biasa untuk mengakibatkan kematian. Oleh itu, perayu didapati bersalah atas kesalahan membunuh dan dijatuhkan hukuman mati. Oleh itu, rayuan ini oleh perayu H terhadap sabitan dan hukuman. Isu-isu yang dibangkitkan bagi pertimbangan mahkamah adalah (i) sama ada kecederaan yang dikenakan oleh perayu mungkin tidak diniatkan atau sebaliknya dengan niat; dan (ii) apabila kecederaan dikenakan dengan niat, sama ada kecederaan sedemikian mencukupi dalam perjalanan biasa mengakibatkan kematian si mati di mana I tindakan perayu boleh terangkum di bawah s. 300(c) Kanun Keseksaan.

Diputuskan (membenarkan rayuan; mensabitkan perayu di bawah s. 304(a) Kanun Keseksaan)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Bahagian (c) s. 300 tidak memerlukan pihak pendakwaan membuktikan bahawa perayu mengetahui bahawa tindakannya mencukupi dalam perjalanan biasa untuk menyebabkan kematian. Hakim, oleh itu, tersalah faham undang-undang apabila mendapati perayu mengetahui bahawa tindakannya mencukupi dalam perjalanan biasa untuk mengakibatkan kematian. Dapatan hakim tidak disokong oleh apa-apa keterangan dari mana boleh dibuat kesimpulan bahawa perayu mempunyai pengetahuan tersebut. Unsur pengetahuan hanya perlu apabila pihak pendakwaan memohon untuk membuktikan kesalahan membunuh di bawah bahagian (b) s. 300. Pihak pendakwaan dalam kes ini, tidak menyandar pada bahagian (b) s. 300.

(2) Pertuduhan mengandungi dakwaan bahawa kesalahan tersebut dilakukan antara 6 petang hingga 12 tengah malam pada 31 April 2011, sementara pihak pendakwaan mengemukakan keterangan untuk menunjukkan bahawa kesalahan tersebut didakwa dilakukan oleh perayu sebulan awal iaitu pada 31 Mac 2011. Tidak dipertikaikan bahawa si mati meninggal dunia akibat kecederaan tersebut pada 3 April 2011. Walaupun pihak pendakwaan tidak meminda pertuduhan, hakim bicara dengan betul memutuskan bahawa kecacatan tersebut tidak memudaratkan kerana ia boleh dibetulkan di bawah s. 422 Kanun Tatacara Jenayah ('KTJ') dan meminda pertuduhan dengan menggantikan 31 Mac 2011 bagi 31 April 2011 sebagai tarikh kesalahan dilakukan. Hakim bicara boleh juga menyandar pada s. 156 KTJ kerana kesilapan tersebut tidak penting kecuali jika perayu tersalah arah dengan kesilapan tersebut.

(3) Pertuduhan mendakwa bahawa perayu melakukan pembunuhan tersebut antara 6 petang hingga 12 tengah malam pada 31 Mac 2011. Oleh sebab si mati belum meninggal dunia dalam tempoh yang dinyatakan, kesalahan membunuh yang mana perayu dipertuduh belum dilakukan. Pertuduhan sepatutnya menyatakan bahawa pembunuhan dilakukan antara 6 petang 31 Mac 2011 hingga 8.40 pagi pada 3 April 2011 apabila si mati disahkan meninggal dunia iaitu tarikh dan masa kesalahan membunuh lengkap. Walau bagaimanapun, kecacatan tersebut tidak menjurus kepada ketidakadilan dan boleh diperbetulkan di bawah s. 422 KTJ dan juga tidak material di bawah s. 156 KTJ kerana ia tidak mengakibatkan salah arah kepada perayu.

(4) Kes terhadap perayu secara keseluruhannya adalah berdasarkan kepada keterangan ikut keadaan. Tiada keterangan langsung untuk menunjukkan apa yang berlaku semasa si mati berada dengan perayu di bilik perayu. Apabila pihak pendakwaan cuba membuktikan pembunuhan di bawah

bahagian (c) s. 300, pihak pendakwaan perlu memberikan bukti bahawa kecederaan badan yang diniatkan untuk dilakukan terhadap si mati adalah mencukupi dalam perjalanan biasa untuk mengakibatkan kematiannya. Bukti itu sewajarnya dikemukakan secara keterangan perubatan oleh pakar patologi yang melakukan pemeriksaan bedah siasat. Tanpa keterangan ini, akan ada jurang yang menjejaskan kes pihak pendakwaan di mana unsur penting kedua dalam kesalahan bahagian (c) tidak dibuktikan. Jelas tiada bukti sedemikian daripada keterangan pakar PW24. Keterangan PW24, paling tidak, hanya akan membawa tindakan perayu dalam lingkungan s. 299 Kanun Keseksaan.

(5) Keterangan ikut keadaan secara muktamad membuktikan bahawa perayu sememangnya melakukan tindakan mencekik leher si mati, yang mengakibatkan hanya satu kecederaan, hypoxic sequelae, yang menyebabkan penginfarkan yang menjejaskan otak, tetapi tidak menyebabkan kematian dengan serta merta. Kematian yang berlaku akibat kecederaan badan sedemikian adalah kematian tertangguh. Oleh itu, adalah selamat untuk disimpulkan bahawa tiada keganasan atau tekanan berpanjangan pada leher kerana jika tidak si mati akan meninggal dunia serta merta. Tindakan perayu lebih konsisten dengan kesimpulan bahawa tindakan sedemikian tidak terjumlah kepada menyebabkan kecederaan dengan kemungkinan mengakibatkan kematian. Mempertimbangkan tahap daya yang digunakan dan tempoh yang singkat dalam melakukan tindakan tersebut, perayu tidak mungkin meniatkan kecederaan yang dialami oleh si mati yang mengakibatkan kematiannya.

(6) Perlakuan perayu terhadap si mati sebelum insiden tersebut dan keterangan semasa insiden itu sendiri memperkukuhkan dapatan mahkamah. Dinyatakan dalam keterangan bahawa perayu mengambil berat tentang si mati. Walaupun pada malam insiden malang tersebut perayu telah mengikat, menampar dan memukul si mati, apabila si mati mengalami sawan, perayu telah menyapukan minyak berubat pada si mati dan meletakkan penyapu bulu ayam di mulut si mati untuk mengelakkan kancing gigi. Perayu juga telah memanggil PW6 dan PW9 ke biliknya. Dia menjelaskan selanjutnya bahawa dia mahu si mati mengubah perangainya.

(7) Penafian kosong adalah suatu di mana terdapat penafian mudah tanpa apa-apa penjelasan atau keterangan yang boleh menimbulkan keraguan munasabah pada kes pihak pendakwaan. Perayu memberikan keterangan berkaitan dengan hal keadaan yang menjurus kepada dan sebab-sebab mengapa perayu melakukan tindakan yang dilakukannya kepada si mati. Oleh itu, keterangan perayu tidak terangkum dalam kategori penafian kosong atau fikiran terkemudian. Hakim bicara, dalam memutuskan

bahawa pembelaan perayu adalah penafian kosong dan fikiran terkemudian, langsung tertinggal untuk mempertimbangkan bahawa tekanan yang dikenakan adalah bagi tempoh singkat atau tidak begitu lama. Keterangan sebegitu adalah penting dalam menentukan sama ada perayu mempunyai niat untuk menyebabkan kecederaan yang dipersoalkan.

(8) Mempertimbangkan keseluruhan keterangan, kematian si mati mungkin diakibatkan oleh kecederaan tersebut. Ia sememangnya bukan kematian dalam rangkuman s. 300(c) Kanun Keseksaan yang akan merupakan akibat yang berkemungkinan besar terjadi dalam perjalanan biasa. Ini adalah kes yang boleh dibawa dalam kesalahan lebih rendah homisid salah yang tidak terjumlah kepada pembunuhan di bawah s. 299, dan boleh dihukum di bawah s. 304(a) Kanun Keseksaan.

(9) Tindakan perayu tidak boleh dibiarkan khususnya apabila si mati berada dalam kawalannya semasa dia menjadi warden yang meletakkannya dalam kedudukan memegang amanah tetapi amanah tersebut dilanggar dengan beraninya. Perayu jelas menunjukkan sikap ingkar terhadap undang-undang dengan melampaui kuasanya sebagai warden dan guru. Kepentingan awam menuntut mahkamah memastikan keselamatan awam khususnya di mana ia berkaitan dengan kanak-kanak sekolah yang ditempatkan dalam jagaan pihak berkuasa sekolah dengan mengenakan hukuman segera dan mencukupi bagi jenayah yang bersifat sebegini. Hukuman yang mencukupi bagi jenayah serius sebegini akan menghalang tindakan jenayah pada masa akan datang. Perayu dikenakan hukuman tempoh pemenjaraan 20 tahun dari tarikh tangkapannya.

Obiter:

(1) Apa-apa kesilapan serius dalam pertuduhan boleh mengakibatkan kerugian yang akan menjejaskan kes pihak pendakwaan atau membangkitkan persoalan sama ada ia telah melepaskan beban pembuktian kesalahan yang dipertuduh terhadap perayu. Ia juga boleh bermaksud bahawa pertuduhan tersebut mungkin tidak mendedahkan apa-apa kesalahan atau bahawa perayu tidak dimaklumkan dengan tetap dan tepat, sifat pertuduhan sebenar terhadapnya. Walaupun percanggahan dalam tarikh dan masa pertuduhan tidak dibangkitkan dalam rayuan, adalah penting bagi mahkamah menyelidiki perkara tersebut memandangkan ciri yang jelas tidak memuaskan hati dalam kes pendakwaan yang jelas menunjukkan kecuaian sebenar dalam cara kes tersebut ditangani. Kes ini wajar menjadi peringatan kepada pihak-pihak di mahkamah untuk bertindak dengan lebih tekun dan menunjukkan standard yang lebih berwibawa dalam menangani kes semasa perbicaraan.

[Sabitan dan hukuman mati terhadap perayu diketepikan. Perayu disabitkan dengan kesalahan di bawah s. 304(a) Kanun Keseksaan dan dijatuhkan hukuman 20 tahun penjara].

Case(s) referred to:
Cheong Kam Kuen v. PP [2012] 8 CLJ 537 FC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Chung Tshun Tin & Ors [2007] 10 CLJ 527 HC ***(refd)***
PP v. Megat Shahrizat Megat Shahrur [2011] 5 CLJ 608 CA ***(refd)***
PP v. Saimin & Ors [1971] 1 LNS 115 HC ***(refd)***
PP v. Sainal Abidin Mading [1998] 3 CLJ 41 HC ***(refd)***
Tham Kai Yau & Ors v. PP [1976] 1 LNS 159 FC ***(refd)***
Yeap Boon Hai v. PP [2010] 2 CLJ 338 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 156, 177A, 182A, 422
Penal Code, ss. 299, 300(b), (c), 302, 304(a)

For the appellant - Ariff Azami Hussein, Azizzul Shariman Mat Yusoff & Muhammad Hafiz Leman; M/s Azizzul & Ariff
For the respondent - Wan Shaharuddin Wan Ladin; DPP

[Editor's note: Appeal from High Court, Kangar; Criminal Trials No: 45B-02-07-2011 (overruled).]

Reported by S Barathi

JUDGMENT

Idrus Harun JCA:

The Charge

[1] The appellant in this particular case was tried under s. 302 of the Penal Code for the murder of XXX. He was found guilty of the offence by the High Court and was condemned to death. The appellant's appeal before this court was against the order of such conviction and sentence. The charge against the appellant is in the following terms:

> Bahawa kamu pada 31hb April 2011, antara jam lebih kurang 6.00 petang hingga jam 12.00 malam, di dalam bilik warden, asrama putera, Sekolah Rendah Islam Al-Furqan, Kampung Jejawi Dalam, Arau, di dalam Negeri Perlis, telah membunuh XXX No. My Kid: XXX dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

The Case For The Prosecution

[2] The deceased, at the material time, was a seven year old boy who was a standard one pupil in his third month at Sekolah Rendah Islam Al-Furqan, Kampung Jejawi Dalam, Arau, Perlis. He stayed at the school's hostel. Mohd Yasin bin Mohd Yunus (PW6) and the appellant were the wardens of the hostel. On 31 March 2011 at approximately 12am, a student by the name of XXX (PW9) came to PW6's room informing him that the appellant wanted to see him. PW6 and PW9 thereupon went to the appellant's room.

On arrival at the appellant's room which was next to the room where PW6 lived, PW6 saw the appellant sitting on the floor with the deceased lying on his lap. The deceased had a seizure and a lockjaw. PW6 did not ask the appellant what had happened. The deceased was immediately sent to Tuanku Fauziah Hospital in Kangar.

[3] At the hospital, the appellant told PW6 that he slapped the deceased for stealing. While in the emergency room, one of the hospital's staff asked the appellant what caused the bruises on the deceased's wrist to which, according to PW6, the appellant replied he tied the deceased's hands.

[4] PW6's evidence that the deceased had a seizure was confirmed by Muhammad Shafiq bin Idris (PW10) a houseman on duty at the Kangar Hospital at the material time, whose testimony revealed that the deceased had a seizure and fit. After the deceased was treated, the seizure ceased. PW10 noticed some bruises on the left wrist, on the back and the upper eyelid of the deceased. He also noticed a trauma on the deceased's head, ergo PW10 asked the appellant about the trauma to which the appellant admitted that he had hit the deceased's head. The differential diagnosis of the nature and circumstances of the deceased's condition, according to PW10, was meningitis as the deceased was in feverish condition with the temperature of 39°C. However, the cause of the fever and seizure was unknown.

[5] Dr Mohd Huzaimi bin Ngatiman (PW11) confirmed that there were fresh bruises on the wrist, the upper eyelid and the back of the deceased. These bruises were stated in the medical report PW11 had prepared (exh. P10). According to PW11, the deceased's condition was critical and when the seizure stopped, the deceased was unconscious. The deceased was subsequently sent to Sultanah Bahiyah Hospital in Alor Setar on 1 April 2011. In cross-examination, PW11 agreed that the deceased had a prolonged seizure and it was fatal. He also agreed to a suggestion that proper care at the early stage was necessary. However, PW11 explained that such early care would not help if the brain injury was serious. The deceased was pronounced dead at 8.40am on 3 April 2011.

[6] A post-mortem examination was performed on the body of the deceased on 3 April 2011 at 2.50pm by Dr Mohd Suhani bin Mohd Noor (PW24) for which a report of post-mortem examination was prepared (exh. P40). We observe at this point that the said post-mortem report stated that there was no significant pre-existing natural disease found in the body of the deceased that could have caused his death at that moment in time. There were marks of injury on the body including faint bruises at the right anterior aspect of upper neck and at the midline of the anterior aspect of mid-neck region. These physical injuries were those of blunt force trauma. As regards the injuries to the neck of the deceased, exh. P40 stated that the pattern of the said injuries was consistent with that of a compression of the neck by

manual strangulation. The compression to the neck, it was reported, had given rise to fatal hypoxic sequelae. The cause of death, it was determined, was "hypoxic sequelae to compression of the neck" (*sic*). The report gleaned from exh. P40 also revealed that the other blunt injuries seen on the body of the deceased were not fatal in nature.

[7] PW24 in his evidence testified that the injuries on the body of the deceased as stated in exh. P40, were between two to three days old before his death. Insofar as the injury on the deceased's head was concerned, PW24 testified that it was caused by a blunt object but was not sufficient or strong enough to cause a fracture on the skull or to cause a brain haemorrhage or injury to the brain. In the deceased's case, PW24 said, the death could be considered a delayed death following the compression of the neck but this was not abnormal. In cases involving compression of the neck, death would result immediately or the victim would be found when he was already dead. This, PW24 emphasised, could happen if the degree of violence was high where the compression was maintained or continued until the victim died. However, if the compression was brief such that it was not longer than necessary to kill a person but sufficient to prevent or deprive the supply of blood containing oxygen to the brain, death would not occur immediately but it would cause injury to the brain. Such injury, PW24 testified, was irreversible and hypoxic injury to the brain would be the cause of death of which the original cause was the compression on the neck which affected the ability of the blood to supply oxygen to the brain.

[8] Under cross-examination, PW24 explained that being in irreversible condition would mean that the deceased's condition would continue to deteriorate even if there was treatment. Further in his evidence, PW24 said that the hypoxic brain damage had also caused the deceased to have a seizure. However, PW24 admitted that he did not mention about the seizure in his post-mortem report (exh. P40) as it was not the cause of the deceased's death. PW24 believed that in this case the compression of the neck did not occur for a long time but it had caused carotid sinusreflex resulting in cardiac arrest or the heart beat to stop for a while. Elaborating further, PW24 said that carotid sinus was a small structure found on both sides of the neck which if compressed following the compression of the neck would result in the heart beat to stop. This is called carotid sinusreflex.

[9] Having considered the medical evidence relating to the cause of death of the deceased, we shall revert to the narrative relating to the events leading to and the prosecution case that it was the appellant who caused, the death of the deceased. It will be recalled that PW6 testified that the appellant told him that he slapped the deceased for stealing. At the hospital, the appellant admitted that he tied the deceased's hands and hit him on the head. Prior to this incident, according to Mohd Amin bin Zainuri (PW22) who was a

standard six student, on 31 March 2011 at about 5pm, the accused called the deceased who was sitting in front of the hostel. However, there was no evidence led by the prosecution to show whether the deceased went to see the appellant soon after the appellant called him save PW22's testimony which revealed that the deceased went into the hostel. PW22 next testified that after the Maghrib prayer, the students gathered for a Yassin recital session, but the deceased did not attend. Normally, the appellant would attend the recital session however on that evening, though the appellant attended the session, he did not stay until the end of the gathering. It was the evidence of PW22 that the deceased was in the appellant's room.

[10] PW9 in his testimony confirmed that on 31 March 2011 there was the gathering of students for the Yassin recital session after the Maghrib prayer and the deceased was absent. According to PW9, the deceased was in the accused's room. Questioned further, PW9 said that he knew because before the recital session, as he was taking ablution behind the appellant's room he heard the deceased cry in the appellant's room. At about 12am the appellant came to PW9 dormitory and told him to call PW6. Both PW6 and PW9 went to the appellant's room. PW9 saw the appellant sitting on the floor cross-legged while the deceased was lying on a blue mattress naked. The deceased appeared to be having a seizure. We pause to observe at this stage that PW9's evidence slightly differed from PW6's evidence in which PW6 said he saw the appellant sitting on the floor with the deceased lying on his lap. The contradiction, in our opinion, is minor.

The High Court's Decision At The End Of The Prosecution Case

[11] The learned judge, at the close of case for the prosecution held that the prosecution failed to prove a *prima facie* case against the appellant for the offence with which he was charged. The learned judge, however, proceeded to amend the charge against the appellant for an offence under s. 304(a) of the Penal Code. The accused thereupon pleaded guilty on the amended charge and was accordingly sentenced to 18 years of imprisonment effective from the date of his arrest. This court, on an appeal by the prosecution, ordered for the defence to be called.

The Defence

[12] In his evidence, the appellant testified that the deceased was a bright student and he paid more attention to him especially when he was informed that the deceased had the habit of stealing other students' personal belongings. He was close to and cared for the deceased. So close was he to the deceased that on one occasion when he discovered that the deceased did not have a sportswear he used his money to buy one for the deceased. On another occasion, he bought a watch for the deceased when it was reported that the deceased took his sibling's watch. The appellant had also bought an

A Iqra' book and given the deceased some money. The problem started several weeks after the deceased lived at the hostel when the students lodged complaints that they lost their money accusing the deceased of stealing their money. When the appellant checked the deceased's closet, he found RM10 and returned it to the rightful owner. He advised the deceased against stealing
B other people's belongings.

[13] It was also the appellant's evidence that some students kept their own money with them. However some parents including the deceased's adopted parents preferred to give their children's pocket money to the teachers including the appellant for safe keeping and to be given to their children
C every day. On 31 March 2011, the appellant woke up late. As such he was not able to give daily pocket money to the deceased and other students under his charge. However, in that morning while the appellant was walking towards the surau to attend the school assembly, he saw the deceased holding a one dollar note. When the appellant confronted the deceased about the
D money, he did not admit to stealing the money. The appellant did not pursue the matter any further at that moment of time as the class was about to begin.

[14] In the late afternoon, after the appellant had completed repairing the pipe in the other warden's quarters, he saw the deceased sitting outside the hostel. The appellant then recalled about the money which the deceased was
E seen holding in his hand in the morning. He therefore took the deceased to his room where he scolded the deceased. The appellant watched the deceased in amazement when the deceased just ignored and did not respond to him. The appellant became angry. He admitted that he slapped the deceased and hit his head but denied strangling his neck. The deceased's hands were tied
F to the iron grill of the window while standing up. The appellant only untied the deceased after Maghrib prayer. At one stage when the appellant advised the deceased against stealing and told the deceased that a person who stole would go to hell in the hereafter, the deceased replied that he would like to go to hell. The deceased's response exasperated the appellant as a result of
G which he reacted by lifting and shaking the deceased three or four times. The deceased screamed and cried. The appellant explained that he did so as he wanted the deceased to discard his bad habit and reform. The deceased was then told to sleep. However, fate had it that the deceased had a seizure attack at midnight and he was subsequently sent to the hospital and died two and a half days later on 3 April 2011. Save for the appellant, the defence did not
H call any other witness.

The High Court's Decision At The End Of The Defence

[15] The learned judge found that the defence was a bare denial. The compression of the neck had caused brain haemorrhage which was due to
I oxygen deprivation to the brain leading to the death of the deceased.

[16] The evidence led by the prosecution, according to His Lordship, showed that only the appellant who could have committed the act of compression to the deceased's neck manually. Mere denial of the established material facts would not raise any reasonable doubt thereon.

[17] The learned judge found that the act of the appellant in strangling the deceased fell under s. 300(c) of the Penal Code. His Lordship conceded that it was true that when the appellant had strangled the deceased he did not have the intention to kill the deceased but he strangled the deceased intentionally. The appellant's act had caused the injury on the deceased that led to his death. The evidence of PW24, according to the learned judge, proved that the compression on the neck would ordinarily caused death, though such death would not occur immediately. In this case, the appellant, while committing the act, knew that his act was sufficient in the ordinary cause of nature to cause death. Accordingly, the learned judge concluded, the prosecution had succeeded in proving the offence against the appellant under s. 300 of the Penal Code.

Decision

[18] We shall deal, as a necessary preliminary, with the essential elements of the offence under s. 302 of the Penal Code which the prosecution has to establish, and so far as it relates to the charge against the appellant, these are:

(i) Saiful Syazani bin Saiful Sopfidee died;

(ii) he died as a result of the bodily injury sustained by him as a result of the act of compression of the neck of the deceased by manual strangulation committed by the appellant; and

(iii) the appellant committed such act:

(a) with the intention of causing the deceased's death;

(b) with the intention of causing such bodily injury as the appellant knew to be likely to cause the deceased's death; or

(c) with the intention of causing the injury to the deceased and such injury intended to be inflicted was sufficient in the ordinary course of nature to cause his death.

[19] The prosecution relies on the above sub-para. (c) which is limb (c) of s. 300 of the Penal Code submitting that the appellant had inflicted the injury intentionally which was sufficient in the ordinary course of nature to cause the deceased's death. The learned judge, as we have stated a moment ago, found that, the appellant while committing the act, knew that his act was sufficient in the ordinary course of nature to cause the deceased's death. Limb (c) of s. 300, in our view, has two requisite elements which must be

established by the prosecution before the appellant could be convicted for murder under s. 302 of the Penal Code. Firstly, the prosecution has to prove that the bodily injury inflicted by the appellant on the deceased that is 'hypoxic sequelae' due to the compression of the neck was intentional. Secondly, it would be incumbent on the prosecution to also prove that the said injury was sufficient in the ordinary course of nature to cause the deceased's death.

[20] Limb (c) of s. 300 does not, in our opinion, require the prosecution to prove that the appellant knew that his act was sufficient in the ordinary course of nature to cause death. The learned judge therefore had misapprehended the law when he found that the appellant knew that his act was sufficient in the ordinary course of nature to cause death. In any event, His Lordship's finding was not supported by any evidence from which it could be inferred that the appellant had such knowledge. We would emphasise that the element of knowledge is only necessary where the prosecution seeks to prove the offence of murder under limb (b) of s. 300. The prosecution, in this case, is not relying on limb (b) of s. 300.

[21] The appellant set out seven grounds of appeal in his petition of appeal which can be neatly summarised as follows:

(a) The learned trial judge had erred when His Lordship found that the defence was a bare denial and an afterthought and that it required corroborative evidence;

(b) The learned judge had erred in failing to direct his mind to the fact that the injury caused was probably not intended by the appellant;

(c) The learned judge had erred in law and in fact when His Lordship stated that he was bound by the decision of the Court of Appeal in ordering the appellant to enter on his defence without proper re-evaluation of the entire evidence at the end of the defence case.

In our view, broadly, the main and crucial issue on which the appeal turns is whether the injury inflicted by the appellant was probably not intended or otherwise intentional and where the injury inflicted was intentional whether such injury was sufficient in the ordinary course of nature to cause the deceased's death so that the appellant's act could be brought under s. 300(c) of the Penal Code.

[22] But before we go more closely into the merits of this appeal, it ought to be highlighted at this point that the charge contains an allegation that the offence was committed between 6pm to 12 midnight on 31 April 2011. The prosecution, it is to be remembered, led evidence to show that the offence against the appellant was alleged to have been committed by him one month earlier which was on 31 March 2011. It is not disputed that the deceased

succumbed to the injury on 3 April 2011 approximately two and a half days after the alleged act by the appellant. The learned DPP who conducted the prosecution of this case in the court below did not, however, realise about the error in the charge. Had the prosecution been careful, it would have noticed that the date of the commission of the offence was correctly stated in the consent to prosecute issued under s. 177A of the Criminal Procedure Code which was 31 March 2011 (exh. A). It was only during the submission of no case to answer by the defence at the close of the prosecution case that the issue of the defective charge was raised by the defence.

[23] The prosecution did not amend the charge subsequently. However, following this submission, the learned judge correctly decided that the defect was not fatal as it was curable under s. 422 of the Criminal Procedure Code. Hence, the learned judge amended the charge substituting 31 March 2011 for 31 April 2011 as the date of the commission of the offence. We would, for completeness, also add that, apart from s. 422, the learned judge could also rely on s. 156 of the Criminal Procedure Code as such error was not material unless the appellant was in fact misled by that error. We are prepared to assume that based on the said decision, the learned judge had proceeded to amend the charge accordingly. However, in his grounds of judgment, the learned trial judge, we observe, still referred to the original charge which bore the original date of 31 April 2011. We are of the opinion that this should not have been the case and the learned judge should have referred to the amended charge which contained the correct particulars relating to the date the offence was alleged to have been committed.

[24] We thought that with the above observation, the issue relating to the charge could be put to rest. However, having considered the evidence, we could clearly discern yet another error in the charge which undoubtedly relates to the above issue. It was alleged in the charge that the appellant committed murder by causing the deceased's death between 6pm to 12am on 31 March 2011. However, the deceased had not died yet during the period in question. Hence, the offence of murder with which the appellant was charged had yet to be committed. In fact, the deceased died on 3 April 2011 *circa* 8.40am. The charge should therefore have stated that the alleged murder was committed between 6pm on 31 March 2011 to 8.40am on 3 April 2011 when the deceased was pronounced dead which was the date and time the crime of murder was perfected. We would note, anyhow, that this is not an issue before us in this appeal. However, it is of some significance we delve into the matter in view of these manifest unsatisfactory features in the prosecution case that clearly demonstrate sheer carelessness in the manner in which the case was handled. We need only say on this aspect that this case should be a salutary reminder to parties before the court to be a little more diligent and display the highest standard of competence in conducting the case during a trial.

[25] It might be apposite to bear in mind of what this may entail at the trial as any serious error in the charge in this particular instance, can be a costly blunder that could affect the proof of the prosecution case or raise the question whether it has discharged the burden of proving the offence with which the appellant is charged. It could also mean that the charge may not disclose any offence or that the appellant has not been informed with certainty and accuracy, the exact nature of the charge brought against him (*PP v. Chung Tshun Tin & Ors* [2007] 10 CLJ 527). Notwithstanding this irregularity and omission, we are of the opinion that such irregularity had not occasioned a failure of justice as there was clear and overwhelming evidence which showed that the deceased died at 8.40am on 3 April 2011 and the appellant was fully aware of this fact. The irregularity, therefore did not occasion a failure of justice and is curable under s. 422 of the Criminal Procedure Code. Such irregularity, for the same reason, is also immaterial under s. 156 of the Criminal Procedure Code as we are satisfied that it did not mislead the appellant.

[26] Moving on, the law may now seem obvious that the general burden of proof lies throughout on the prosecution to prove beyond reasonable doubt the guilt of the appellant for the offence with which he is alleged to have committed. There is no similar burden placed on the appellant to prove to the satisfaction of the court, the trier of fact, of the appellant's innocence. He is presumed innocent until proven guilty. In dealing with the duty of the trial court at the end of the defence case, it would be beneficial to be reminded of the Supreme Court's decision in *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 from which the relevant excerpt is reproduced below:

> ... whenever a criminal case is decided on the basis of the truth of the prosecution case as against the falsity of the defence story, a trial judge must in accordance with the principle laid down in *Mat v. PP* [1963] 1 MLJ 263 go one step further before convicting the accused by giving due consideration as to why the defence story though could not be believed did not raise a reasonable doubt on the prosecution case. Thus, even though a Judge does not accept or believe the accused's explanation, the accused must not be convicted until the Court is satisfied for sufficient reason that such explanation does not cast a reasonable doubt on the prosecution case.

[27] This is the threshold of proof which the prosecution is required to discharge. (See also *PP v. Saimin & Ors* [1971] 1 LNS 115; [1971] 2 MLJ 16). Under s. 182A of the Criminal Procedure Code, it is clearly the duty of the court to consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt. This is a mandatory requirement as evident by the use of the word 'shall' in that section. What it entails is that, at the end of the defence, it would be

incumbent for the court to evaluate the entire evidence placed before it including the prosecution evidence. In this case, it would seem that the learned judge, resigned to the fact that this court had ordered the trial court to call for the defence, was of the opinion that it was not open for His Lordship to reconsider whether the appellant's act was one that could justifiably be brought within s. 300(c) or s. 299 of the Penal Code or could not be brought within neither of these sections. That proposition is certainly fallacious as it does not truly reflect the correct position of the law and would undoubtedly show a manifest failure to comply with the mandatory requirement under s. 182A of the Criminal Procedure Code.

[28] However, it is worthy of note that, the learned judge, despite stating the above incorrect position, did acknowledge that the appellant had raised the pertinent issue whether the appellant's act fell under s. 300(c) of the Penal Code and accordingly His Lordship proceeded to consider this issue again at the defence stage.

[29] The case against the appellant as the learned judge correctly stated, was based entirely on circumstantial evidence. In fact, our close scrutiny of the evidence showed that there was no direct evidence to show what had happened on the 31 March 2011 between 6pm until 12am while the deceased was with the appellant in the appellant's room. The evidence placed before the court is somewhat scanty. At 5pm, according to PW22, the appellant called the deceased who was sitting outside the hostel. The deceased went into the hostel. The first clear indication that the deceased was in the appellant's room came from the evidence of PW9 who testified that he heard the deceased cry in the appellant's room as he was taking ablution before the Yasin recital session. Save for this evidence, nobody saw the deceased in the appellant's room and witnessed what had happened whilst the deceased was there. However, when PW6 and PW9 went to the appellant's room at midnight, the deceased was seen with the appellant in the condition we mentioned earlier when we dealt with the prosecution's evidence. Thus, the evidence available before us is purely circumstantial.

[30] The evidence in connection with the cause of the deceased's death came from the pathologist, PW24. The cause of death according to PW24 was "hypoxic sequelae to compression of the neck" (*sic*). In other words, the compression to the neck had given rise to fatal hypoxic sequelae leading to the death of the deceased.

[31] We are mindful that the prosecution relies on s. 300(c) of the Penal Code. However, the learned Deputy Public Prosecutor (DPP) quite candidly conceded at the beginning of his written submission that there was no evidence *in verbatim* in PW24's testimony or specific question put to PW24 that the injury inflicted on the deceased was sufficient in the ordinary course of nature to cause the deceased's death in order to bring the prosecution case

under the said provisions of the Penal Code. In our view, where the prosecution seeks to prove murder under limb (c) of s. 300, the prosecution ought to provide proof that the bodily injury intended to be inflicted on the deceased was sufficient in the ordinary course of nature to cause his death. That proof should appropriately be adduced by way of medical evidence of the pathologist who conducted the post-mortem examination. Without this evidence, there would be a fatal gap in the prosecution case in that the second essential element of the offence in limb (c) is not established. Reference in this connection may be made to the case of *Cheong Kam Kuen v. PP* [2012] 8 CLJ 537 wherein the Federal Court accepted that there was no evidence led from the pathologist as to whether the injuries inflicted on the deceased were sufficient in the ordinary course of nature to cause death. In view of the nature of the medical evidence, the Federal Court held that the case would fall within the second part of s. 304(a) of the Penal Code.

[32] The learned DPP, however, submitted that if the evidence of PW24 is considered in totality, the requisite element under limb (c) is fulfilled when PW24 testified:

> Si mati meninggal dunia akibat komplikasi hypoxite akibat tekanan pada bahagian leher, kematian ini boleh disifatkan sebagai delayed death following compression on the neck … Tetapi sekiranya compression tersebut dikenakan untuk tempoh masa yang pendek iaitu tidak sepanjang mana yang diperlukan untuk membunuh seseorang tetapi cukup untuk menghalang bekalan darah yang membawa oksigen ke organ otak untuk tempoh yang memadai, maka kematian mungkin tidak berlaku pada ketika itu tetapi akan berlaku kerosakan pada organ otak dan kerosakan ini adalah bersifat irreversible atau pun tidak boleh berpatah balik dan hypoxic injury pada otak akan menjadi punca kematian, yang mana punca asalnya adalah tekanan leher yang mengganggu keupayaan darah untuk membekal oksigen pada organ otak.

[33] With due respect to the learned DPP, we do not think anything material or significant turns upon this argument. It must be emphasised that such evidence should be elicited from PW24 as this is crucial in order to prove the second part of limb (c) of s. 300 being one of the two requisite elements that the prosecution has to establish. There was, in our finding, a glaring absence of such proof especially from PW24's expert testimony. In the absence of any such clear, conclusive and specific evidence, PW24's evidence as highlighted above would raise the ineluctable question whether, PW24's expert evidence as it stands, has shown that the injury inflicted, was sufficient in the ordinary course of nature to cause the death of the deceased. Such evidence in our judgment would under no circumstances establish this essential element of the offence of murder under s. 300(c). The evidence at best, would only bring the appellant's act to be within s. 299 of the Penal Code. The learned judge had notably failed to address his mind to this

relevant issue. Had His Lordship done so, he would have noticed that there was, in view of the conspicuous absence of direct evidence, a gap of mortal proportion in the prosecution case against the appellant where it sought to prove the offence of murder under s. 300(c) of the Penal Code.

[34] The learned judge in convicting the appellant discredited the appellant's denial on the material facts established by the prosecution and rejected it as a bare denial and an afterthought. His Lordship accepted PW24's evidence on the cause of death of the deceased and held that such evidence when considered in the light of other circumstantial evidence, would raise only one inference in that the appellant, and no one else, had intentionally caused the compression of the deceased's neck that led to his death.

[35] Before proceeding further, we may mention that as regards injuries other than the bruises on the deceased's neck, we are satisfied that the evidence is clear. The appellant himself admitted that he tied the wrists of, as well as hit and slapped, the deceased. We also accept that the appellant was with the deceased in his room at the material time. However, all these injuries according to PW24 and exh. P40 were not fatal in nature and did not cause the death of the deceased. The pertinent issue for our determination therefore, would be whether the appellant did inflict the fatal injury, which was hypoxic sequelae due to the compression of the neck, on the deceased and if he did, whether he did so deliberately. The prosecution submitted that the appellant inflicted the fatal injury intentionally. The appellant, however, during cross-examination denied that he strangled the deceased. He also disagreed with the learned DPP's suggestion that when he lifted the deceased he strangled the deceased's neck.

[36] The general tenor of the appellant's defence, in our opinion, would appear to be that, while the appellant admitted that he punished the deceased by hitting, slapping and tying the deceased, he intended this punishment only to serve as a lesson in the hope that the deceased would discard his bad habit and turn over into a new leaf. It was also in the appellant's evidence that the injury that he had inflicted was not intentional. We would also mention in this regard, that the evidence that the punishment was intended to reform the deceased was hardly challenged by the prosecution during cross-examination. There was, in fact, the irrefutable evidence that the appellant had scolded and punished the deceased on other occasions prior to 31 March 2011 for stealing. On the day in question, the appellant saw the deceased holding a one dollar note which aroused his suspicion that the deceased had returned to his old habit of stealing money again. The appellant reasonably suspected that it was so because in that morning, since he woke up late, he could not give the deceased and other students under his charge their pocket money. The deceased, however, did not admit to stealing the money when

he was confronted by the appellant and the appellant could not pursue the matter any further as the class was about to begin. It was later in the day that, when he saw the deceased outside the hostel, the appellant called the deceased to his room where the fatal event which we had narrated earlier had occurred thereafter.

[37] Based on the factual scenario that we can logically conclude from the circumstantial evidence, it does indeed go without saying that the act of compression of the deceased's neck was done by the appellant. This finding is one which is inevitable and in fact it is a foregone conclusion. The appellant's testimony quite clearly showed that the deceased was in the appellant's room until midnight when the deceased was seen by PW6 and PW9 having a seizure attack. The appellant was also in the room. PW24 in his testimony, said that the pattern of the bruises to the neck was consistent with that of the compression of the neck by manual strangulation. Despite the accused's denial, the circumstantial evidence, in our judgment, had conclusively established that the appellant did commit the act of compression to the deceased's neck. There is however, absolutely no evidence which showed how the appellant compressed the deceased's neck. Notwithstanding this lack of evidence, we find that the act of compression in question had caused only one injury that is hypoxic sequelae which had caused infarction affecting the brain but did not cause immediate death. The death that ensued from such bodily injury was delayed death. According to PW24, immediate death would occur where the degree of violence was high with the compression being maintained or continued until the victim died. We would say in this particular case, that the deceased's death clearly did not occur in that manner as was manifestly demonstrated by the evidence that the deceased succumbed to the injury two and a half days later.

[38] It could therefore be safely inferred that in the instant case, there was no violence and the prolonged or continued compression of the neck lest the deceased's death would have been instant. Another significant point which ought to be emphasised at this stage is that, PW24's testimony undisputedly showed that the compression was brief causing merely faint bruises on the neck. These established facts are clear testimony to this reasonable inference and support the conclusion that there was no high degree of violence involved and the manual strangulation was not carried out with sufficient degree of force. This fact, when considered in the light of the evidence that the deceased succumbed to death two and a half days later, would make it reasonable for this court to inevitably say that it would not have been easy to infer an intention of the appellant to inflict such injury as with the case where death is the result of an act of stabbing with a sharp weapon or a blunt force trauma on the head. Whether the compression was caused unintentionally should by no means be ruled out especially in the absence

of clear evidence of the manner in which the act was carried out by the appellant. The appellant's act was more consistent with an inference that such act was not calculated to inflict the injury in question with the probable consequence of death. We come to this conclusion mindful of the fact that intention is a mental element which involves the state of the mind and is incapable of direct proof. Whether it exists is a matter of inference after considering the surrounding circumstances including, but not limited to, the nature of the wounds inflicted, the part of the victim's body which sustained the injuries and the nature of the weapon used (*Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159; [1977] 1 MLJ 174 and *PP v. Sainal Abidin Mading* [1998] 3 CLJ 41). Thus considering the degree of force applied and the short period of time involved in committing the act, the appellant could not have intended the injury suffered by the deceased that led to his death.

[39] We have also considered the evidence relating to the appellant's treatment of the deceased prior to the incident in that fateful night and the evidence during the incident itself which in our opinion would fortify the above finding. It is in the evidence that the appellant cared for the deceased. He bought a watch for the deceased after he took his brother's watch. The appellant had bought a sportswear for the deceased and this evidence was supported by the deceased's adopted mother, PW2. On another occasion, the appellant had also bought books for the deceased. Fakhrul Anwar bin Ismail (PW8) who was the mudir or administrator of the school confirmed that the appellant cared for the deceased. On the night of the fatal incident, according to the appellant, he tied, slapped and hit the deceased. But when the deceased had a seizure the appellant applied medicated oil on the deceased and placed a feather duster in his mouth to prevent a lockjaw. This was confirmed by PW6. The appellant had also called for PW6 and PW9 to his room. He further explained that he wanted the deceased to reform.

[40] Next, we have the evidence of Detective Sergeant Azmi Omar (PW1) who was the photographer, which revealed that the photograph of the deceased that he had taken did not show any significant mark on the neck. PW1 said during cross-examination:

> Saya ada ambil gambar bawah dengan tepi tidak nampak kesan ketara kecederaan leher ... Setuju tidak ambil gambar secara direct sebab tidak ada kecederaan di leher.

On re-examination PW1 said:

> Pada pandangan kasar saya, saya tidak nampak kecederaan kasar pada leher.

The post-mortem report (exh. P40), as it turned out, revealed only faint bruises at the right anterior aspect of upper neck and midline of the anterior aspect of mid-neck region. This was further supported by PW24 in his

A evidence. However, the medical report (exh. P10) did not mention anything about the bruises on the neck even though it disclosed other visible bruises at the right upper eyelid, the wrist and the back of the deceased. In our opinion, it is beyond question that the fact that exh. P10 did not mention about the bruises on the neck showed that PW11 who examined the deceased
B and subsequently prepared the said exhibit could not notice those faint bruises which were hardly visible to the naked eyes. PW24 in his evidence as regards the faint bruises on the neck said:

> Ada kesan-kesan lebam yang kelihatan agak samar (kurang jelas) di sebelah hadapan leher.

C PW24's evidence on this point certainly provides the reason as to why PW1 and PW11 could not see the bruises on the neck and exh. P10 made no mention of such bruises.

[41] Further in his evidence, PW24, as we have already mentioned,
D explained that the compression was inflicted for a brief period or was not long enough. Obviously, the learned judge completely omitted to consider this crucial piece of evidence in concluding that the appellant's defence was a bare denial and an afterthought. A bare denial, according to the learned judge, of the important facts established by the prosecution, without more, would not raise a reasonable doubt in the prosecution case. The learned
E judge, it is to be observed, based his finding solely by focusing his attention on the evidence favourable to the prosecution. His Lordship did not appear to have adequately analysed and evaluated the defence evidence as deliberated above. In our judgment, such evidence is critical in determining whether the appellant had the intention to inflict the injury in question in
F order to bring the prosecution case against the appellant under limb (c) of s. 300 of the Penal Code.

[42] The appellant had clearly given his version from his own perspective. Most importantly, the appellant had testified in respect of the circumstances that had led, and the reasons as to what had caused, the appellant to do what
G he had done to the deceased. The appellant's defence therefore cannot be considered to be one of a bare denial. His defence without doubt is intended to dislodge the prosecution case against him by raising a reasonable doubt therein. Bare denial, in our judgment, is one where there is a mere simple denial which is bereft of any explanation or evidence that would cast a
H reasonable doubt in the prosecution case. We do not think that in this context, the appellant's evidence falls within that category of evidence which we could safely say to be a bare denial or an afterthought. The evidence adumbrated above was clearly inconsistent with a suggestion that the appellant had intended to inflict the kind of injury that was covered by
I s. 300(c) of the Penal Code.

[43] The above evidence when considered in the light of the evidence of PW24 that the bruises on the neck were faint bruises, the compression was for a brief period and without sufficient degree of force, PW1's evidence that he did not notice the bruises on the deceased's neck and the evidence of PW11 in his medical report (exh. P10) that while mentioning about fresh bruises on the deceased's body, did not mention about the bruises on the neck as well as the evidence that the deceased died two and a half days later, would collectively show and favour an inevitable finding that it is probable that the case before us fell under s. 299 of the Penal Code (*Cheong Kam Kuen v. PP* [2012] 8 CLJ 537). The deceased's death, upon considering the totality of the evidence was, in our judgment, the likely result from the injury. It certainly is not the death within the contemplation of s. 300(c) of the Penal Code that would be the most probable result having regard to the ordinary course of nature.

[44] The difference between the offence of culpable homicide under s. 299 and the offence of murder which falls under s. 300(c) of the Penal Code was deliberated in the case of *PP v. Megat Shahrizat Megat Shahrur* [2011] 5 CLJ 608 in which this court explained such distinction with lucidity and the relevant excerpts are reproduced below:

> [11] Section 299 of the Penal Code provides:
>
> > Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.
>
> [12] Section 300(c) of the Penal Code provides:
>
> > Except in the cases hereinafter excepted, culpable homicide is murder:
> >
> > (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;
>
> [13] The net effect of the provisions under s. 299 and 300(c) of the Penal Code is that it is culpable homicide if the bodily injury intended to be inflicted is likely to cause death; it is murder, if such injury is sufficient in the ordinary course of nature to cause death. It is on a comparison of these two limbs of s. 299 and s. 300 that the decision of doubtful cases must generally depend. The distinction is fine, but noticeable. In the last analysis, it is a question of degree of probability (see *Tham Kai Yau & Ors v. PP* [1976] 1 LNS 159 FC). The degree of probability here is the degree of probability of death. Explaining the degree of probability of death in the context of s. 299 and the third limb of s. 300 of the Indian Penal Code (which is in *pari materia* with section 299 and s. 300(c) of our Penal Code), the Supreme Court of India said in *State of A.P. v. R. Punnayya* AIR [1977], Supreme Court 45:

> The difference between clause (b) of sec. 299 and clause (3) of section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (b) of section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words 'bodily injury ... sufficient in the ordinary course of nature to cause death' mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

The Court of Appeal went further to hold that it was not sufficient to prove that the injury found to be present was sufficient in the ordinary course of nature to cause death, it must also in addition, be proved that the injury found to be present was the injury that was intended by the accused.

[45] The Federal Court, on appeal, affirmed the decision of this court in the above case stating that the difference between both sections which was thin but detectable lied in the degree of probability or likelihood of causing death so that if death was an imminent result, it fell under s. 300 but if death was a likely result, it fell under s. 299 (*PP v. Megat Shahrizat Megat Shahrur* [2011] 8 CLJ 893). To put it simply, if death is a likely result, it is culpable homicide, but if it is the most probable result, it is murder (*Yeap Boon Hai v. PP* [2010] 2 CLJ 338).

[46] We bear in mind the distinction between both sections as explained by this court and the Federal Court in *Megat Sharizat Megat Shahrur* in considering the appeal before us. The grounds of judgment of the learned judge do not appear to indicate a proper, adequate and correct judicial appreciation of the entire evidence, in particular every piece of material evidence adduced before His Lordship in order to ascertain whether the prosecution case has been proved beyond reasonable doubt. Upon thorough scrutiny as well as the maximum and critical evaluation of the entire evidence, and for the reasons discussed above, we are driven inexorably to the conclusion that this case is one which can be brought within the lesser offence of culpable homicide not amounting to murder under s. 299 which is punishable under s. 304(a) of the Penal Code. We therefore allow the appeal and set aside the conviction of, and sentence of death imposed against, the appellant by the High Court. We find the appellant guilty and accordingly convict him under s. 304(a) of the Penal Code.

Sentence

[47] In considering the appropriate sentence, we are mindful that the primary goals of sentencing are punishment, deterrence, incapacitation and rehabilitation. We take into account the nature and the gravity of the crime committed. The appellant, we should say, should consider himself lucky that he is found guilty of a lesser offence and as such has escaped the mandatory

death sentence. However, we do not lose sight of the fact that in this case a life of the child of tender age was lost. The appellant's act cannot be condoned especially when the deceased was under his charge when he was a warden which had placed him in a position of trust but which trust he had so brazenly breached. He had clearly exhibited defiant disregard of the law by exceeding his authority as a warden and a teacher. Public interest demands that the court must ensure public safety in particular where it concerns school going children placed under the care of school authority by meting out immediate and adequate punishment to crime of this nature. The court should also impart adequate punishment for this serious crime and to discourage future criminal conduct. Under the circumstances, we sentence the appellant to a term of imprisonment of 20 years with effect from his date of arrest which is 1 April 2011.